COLORADO LAW
University of Colorado Law School

NATURAL RESOURCES LAW CENTER
Mark Squillace, Professor of Law and Director
Wolf Law Building :: 401 UCB
Boulder, Colorado 80309-0401
303.492.1287 :: fax 303.492.1297
mark.squillace@colorado.edu

Testimony of Mark Squillace

Professor of Law and Director, Natural Resources Law Center
University of Colorado School of Law
Before the U.S. House of Representatives
Committee on Transportation and Infrastructure
***The Clean Water Restoration Act of 2007,* H.R. 2421**

16 April 2008

The Honorable James E. Oberstar, Chairman
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Oberstar:

Thank you for the opportunity to appear before the Committee on Transportation and Infrastructure in support of the Clean Water Restoration Act of 2007. This legislation is critically important not only to protect and conserve our diminishing wetlands, but also to assure broad federal authority over all pollution discharges into our nation's waters. In my testimony this morning I wish to make four points.

1. Our wetlands are a national treasure and we, as a nation, have already sacrificed far too much of this irreplaceable resource.
2. Maintaining the integrity of our nation's waters depends upon maintaining broad federal regulatory authority.
3. Recent Supreme Court decisions have severely constrained federal authority, created confusion about the scope of the Clean Water Act, and diverted significant agency resources away from protecting our nation's waters. These problems can be effectively addressed only by the Congress.
4. The proposed Clean Water Restoration Act of 2007 will effectively address the problems that the Supreme Court's recent decisions have created with the current law.

I will also suggest several minor changes to the proposed legislation that I believe will help clarify congressional intent.

The Importance of Wetlands and the Extent of Wetlands Loss

Wetlands are prized for many reasons. They provide important ecosystem services to plant, animal, and human communities; they serve as natural wastewater treatment facilities, filtering out pollutants and improving water quality; and they absorb the impact of floods and storms and stabilize runoff by retaining water and releasing it gradually.

Wetlands also serve important aesthetic functions. In addition to providing natural ecosystems along coastal areas, they support many species of birds and other wildlife that provide recreational enjoyment for millions of people. The EPA has described wetlands as "nurseries of life" because countless plants and animals rely on them for food, habitat, and breeding grounds. Although they cover less than 5 percent of the land surface, wetlands host 31 percent of all plant species in the lower 48 states. They are among the most fertile and biologically productive ecosystems in the world, rivaling tropical rainforests and coral reefs in the number and diversity of species they support. More than one-third of threatened or endangered species live only in wetlands, and many species depend on wetlands to reproduce.

Wetlands are also vitally important to our marine resources. They provide an essential link in the life cycle of 75 percent of the fish and shellfish commercially harvested in the United States, and up to 90 percent of the recreational fish catch. Two-thirds of all fish consumed worldwide depend on coastal wetlands at some stage in their life cycle.

Given the important ecological role that wetlands play, the extent of wetlands loss over the past two centuries is shocking. Scientists estimate that we have lost 53 percent of the original wetlands acreage in the lower 48 states over a 200-year period between the 1780's and 1980's—a staggering loss of an average of approximately 66 acres of wetlands (or about 50 football fields) every hour of every day for 200 years. While the rate of wetlands loss has slowed over the past 25 years, the quality of our remaining wetlands has continued to decline.

The Need for Broad Federal Authority

If Congress accepts, as I do, that wetlands destruction and water pollution must be regulated and controlled at some level of government, then the only remaining question is at what level of government should that regulation occur? Should regulation occur at the state or federal government, or should it be delegated to some local authority? I believe that when properly understood to encompass all of the federal government's constitutional authority, the Clean Water Act strikes exactly the right balance. It gives plenary authority to the federal government while reserving to the states the opportunity to approve and

manage individual permitting programs and decisions. Water is an article of commerce. It exists in a unitary, hydrologic cycle and flows across our state and national borders. Efforts to restrict the federal government's jurisdiction by distinguishing waters that might or might not have a nexus to navigable waters, as the Supreme Court's *Rapanos* decision appears to require, serve no useful purpose. All of our nation's water and all of our remaining wetlands warrant protection. A federal program that encompasses only some of our waters and wetlands will inevitably force states to adopt supplemental program that are likely to promote inconsistency, confusion, delays, and significant new administrative costs. And all of this will result in a program that is less protective of our nation's waters and wetlands.

In discussions of federal environmental laws, one often hears complaints about burdensome federal programs. Yet the Clean Water Act is remarkable for the broad support that it has received from both the states and private parties. One of the most astonishing facts about the *Rapanos* case is that 34 states and the District of Columbia filed an amicus brief in support of the federal government's broad construction of the statute.[1] Only two states – Utah and Alaska – filed a brief supporting Mr. Rapanos. And while Justice Scalia complained in his plurality opinion in *Rapanos*, that the U.S. Army Corps of Engineers "exercises the discretion of an enlightened despot," the evidence suggests that most permit applicants view their experience dealing with the Corps very favorably. Kim Diana Connolly, *Survey Says: Army Corps No Scalian Despot*, 37 ELR 10317 (2007).

The Problems Caused by the Supreme Court's Construction of the Phrase "Navigable Waters" under the Clean Water Act

The Clean Water Act regulates the discharge of pollutants and of dredged and fill materials into "navigable waters" which it defines to encompass the "waters of the United States." 33 U.S.C. § 1362(7). The statute does not further define the term "waters of the United States," but the conference report on the legislation makes clear that Congress intended the "broadest possible constitutional interpretation." S. Rep. No. 92-1236, at 144 (1972). On the floor of the House, Congressman John Dingell explained further that – "this new definition [of navigable waters] clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability…going to govern…." 118 Cong. Rec. 33,756-57 (Oct. 4, 1972).

[1] In alphabetical order, these states are: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington, and Wisconsin.

Unfortunately, a majority of the Supreme Court has been unwilling to accept these expressions of congressional intent. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* 531 U.S. 159 (2001), the Court held that the Clean Water Act did not give the Corps the authority to regulate intrastate ponds used by migratory birds because, according to the majority, in enacting the Clean Water Act Congress did not intend "to exert anything more than its commerce power over navigation." *Id*. at 168 n.3. Four justices – Stevens, Ginsburg, Souter, and Breyer – dissented and would have deferred to the expansive interpretation of the Clean Water Act put forward by the EPA and the U.S. Army Corps of Engineers.

More recently in *Rapanos v. United States*, 126 S.Ct. 2208 (2006), a four-judge plurality concluded that for purposes of §404 of the Clean Water Act, which requires permits for discharges of dredged and fill material into waters of the United States, federal jurisdiction "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes." *Id.* at 2225. Writing for the plurality, Justice Scalia conceded that there was an "inherent ambiguity" in attempting to draw a line between water and land, and so he deferred to the Corps' decision to include wetlands that actually abut "traditional navigable waters." *Id.* Beyond this, however, he refused to recognize the Corps' authority. Writing separately, Justice Kennedy took a broader view of the law than the plurality, but he would still demand a "significant nexus" between the wetlands and traditional navigable waters. Once again, the four dissenters in *SWANNC* dissented in *Rapanos* for much the same reason as they did in *SWANCC*.

Whether one agrees or disagrees with the legal analysis in the various Supreme Court opinions construing the phrase "navigable waters," one thing seems clear. As currently construed by the Supreme Court, the Clean Water Act does not encompass the full scope of federal power under the constitution. As a result, the federal government currently lacks the statutory authority to fully control water pollution discharges and wetlands destruction activities. Moreover, the divergent opinions from the Supreme Court have created a significant amount of confusion as to the scope of federal power. At best, this leads to expensive and time-consuming ad hoc reviews of the nexus between wetlands and non-navigable waters and navigable waters to determine whether or not the federal government has regulatory jurisdiction. At worst, it leads to gaps in the regulation of environmentally damaging activities, inconsistent decisions, and an agency reluctant to test the full scope of its power. The confusion and uncertainty created by the current state of the law virtually invites litigation.

It makes no sense to continue down this road. If we agree as a policy matter that water pollution should be regulated regardless of the site of its release, and if we agree that our remaining wetlands should be protected wherever they are located, then we ought not

waste time and government resources fighting over jurisdictional issues. The law should be amended to restore Congress' original intent.

Perhaps the best way to understand the mischief that has been created by the *Rapanos* decision is to look at two recent cases applying that decision. In the first case, *United States v. Chevron Pipe Line Co.*, 437 F.Supp.2d 605 (N.D. Tex. 2006), the United States brought an action against Chevron Pipe Line after a corroded pipeline leaked 3,000 barrels of oil into an ephemeral creek. The action was brought under the Oil Pollution Act, which imposes strict liability for natural resource damages and removal costs for the discharge of oil "into or upon the navigable waters or adjoining shorelines." 33 U.S.C. § 2702(a). As with the Clean Water Act, "navigable waters" are defined in the Oil Pollution Act as "waters of the United States." *Id.* at § 2701(21). The unnamed creek that received the discharge flows into Ennis Creek, which flows into Rough Creek, and then to the Double Mountain Fork of the Brazos River. The spill occurred 500 feet upstream of the confluence with Ennis Creek and extended to that confluence. However, the evidence showed that there was no flowing water in the creek from the time of the spill in August 2000 until October 12, 2000, when the first rainfall event occurred. Chevron Pipe Line claimed that by the time of the rainfall, it had completed remedial measures. The United States produced evidence indicating that extensive areas of oil contaminated soil remained until some time after October 12. Nonetheless, relying in large part on the *Rapanos* decision, the district court concluded that Chevron's motion for summary judgment should be granted because there was no evidence "that the site of the farthest traverse of the spill is *navigable-in-fact* or adjacent to an open body of navigable water." 437 F. Supp.2d at 615. *See also, San Francisco Baykeeper v. Cargill Salt Division*, 481. F.3d 700 (9th Cir. 2007), suggesting that only wetlands adjacent to navigable waters, and not other water bodies, are covered by the Clean Water Act.

An even more disturbing decision was recently announced by a three-judge panel of the 11th Circuit Court of Appeals in a criminal prosecution for Clean Water Act violations. *United States v. Robison*, 505 F.3d. 1208 (11th Cir. 2007) involved not a §404 permit but rather a §402 permit, which governs discharges of pollutants into waters of the United States. The defendants had obtained a §402 permit authorizing pollution discharges into Avondale Creek, which flowed continuously into Village Creek, and then into Bayview Lake and Locust Fork, and ultimately into the navigable Black Warrior River. The defendants had repeatedly and knowingly violated their permit, ordered employees to violate the permit, and lied to the EPA about what they were doing. The Justice Department brought a 25-count indictment against the defendants. The district judge dismissed two counts, and the jury convicted on 20 of the remaining 23 counts. On appeal to the 11th Circuit, the Court held that while the trial court decision could be sustained under either the four-person plurality opinion in *Rapanos*, written by Justice Scalia, or the four-person dissenting opinion of Justice Stevens, the decision should nonetheless be

reversed because the trial judge had failed to instruct the jury on Justice Kennedy's significant nexus test, which, the court held, was the governing law of the *Rapanos* case.

While a good argument can be made that the courts in both the *Chevron Pipe Line* and *Robison* misapplied *Rapanos*, it is hard to argue with the fact that *Rapanos* has caused considerable confusion as to the scope of the current law and has greatly increased the government's burden in proving its case. Of course, if there were a reasonable disagreement about the need to regulate oil spills or pollution discharges that occur in creeks and streams that ultimately flow into "traditional navigable waters," perhaps the administrative costs of proving these cases would be worth it. But I believe that a substantial consensus exists in this country for regulating these pollution discharges into virtually any water body even where the connection to traditional navigable waters may seem remote and speculative. Thus, no policy justification exists for the burdens imposed by the *Rapanos* decision.

The Clean Water Restoration Act of 2007

The Clean Water Restoration Act of 2007 would amend the current law defining the phrase "waters of the United States" to mean:

> …all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.

Wisely, the proposed legislation also strikes the phrase "navigable waters" entirely from the statute. This change reflects the important observation that the Clean Water Act is a pollution statute and has nothing to do with navigation. Although Congress' broad intent may have been clear, the historic reference in the statute to "navigable waters" was a mistake and this correction is long overdue. I have two suggestions that would further improve this legislation. First and most importantly, many other federal laws build off of the Clean Water Act in using the phrase "navigable waters" to establish the scope of the federal government's jurisdiction. A thorough review of all such legislation is critically important so that similar changes can be made to this other legislation as well. One important example, relevant to the *Chevron Pipe Line* case, is the Oil Pollution Act, which, like the Clean Water Act limits its scope to "navigable waters" defined simply as "waters of the United States." 33 U.S.C. § 2701(21). Other laws that use the phrase "waters of the United States," such as the Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990, 16 U.S.C. §471 *et seq.*, should be reviewed and considered to determine whether a complementary amendment should be adopted.

Second, while the new proposed definition of "waters of the United States" seems clear, Justice Scalia's opinion in *Rapanos* relies on a dictionary definition of the word "waters" to severely limit the meaning of that phrase. While use of a common dictionary would seem inappropriate where Congress provides the definition to be used, Congress might nonetheless consider adopting a phrase that is more descriptive of its intent such as "constitutional waters." If jurisdiction under the Clean Water Act is extended to all *constitutional waters*, little doubt would remain about Congressional intent.

Thank you for the opportunity to appear before the Committee on Transportation and Infrastructure. My views on this matter are more fully developed in a recently published article entitled. *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 MICH. J. OF L. REF. 799 (2007), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=40171.

Please let me know if I can provide any additional information regarding my support for the Clean Water Restoration Act of 2007.

Sincerely,

Mark Squillace
Professor of Law and
Director, Natural Resources Law Center